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IN THE

Supreme Court of the United States

AVERILL PARK CENTRAL SCHOOL DISTRICT, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, and AVERILL PARK HIGH SCHOOL,

Petitioners,

v.

LOUIS J. CIOFFI, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

BETH A. BOURASSA
Counsel of Record
JOHN P. CALARESO, JR.
WHITEMAN OSTERMAN
& HANNA LLP
One Commerce Plaza
Albany, New York 12260
(518) 487-7600

Attorneys for Petitioners

203341

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Averill Park respectfully requests that this Court grant certiorari for the limited purpose of vacating the decision of the United States Court of Appeals for the Second Circuit, and remanding for reconsideration in light of this Court's subsequent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). For the additional reasons set forth below, the petition for certiorari should be granted.

REPLY TO COUNTERSTATEMENT OF FACTS

For purposes of Averill Park's petition for certiorari, the facts of this case are germane only to the question of whether, on remand, the Second Circuit reasonably might conclude that Cioffi's November 7, 2001 letter and his subsequent press conference were undertaken pursuant to Cioffi's official duties as Athletic Director, and thus do not constitute protected speech following *Garcetti*. Cioffi's brief in opposition includes a lurid, inaccurate, and ultimately irrelevant account of an allegedly "out-of-control" football team and an alleged "cover up" of an alleged "sexual assault." Cioffi, however, does not and cannot dispute Averill Park's recitation of the pertinent record evidence which, if reconsidered by the Second Circuit in light of *Garcetti*, would support a conclusion that Cioffi's speech is not protected under the First Amendment.

Averill Park is not complaining about "erroneous factual findings" by the Second Circuit. (Brief in Opposition, pp. 1, 9-10.) To the contrary, Averill Park's petition rests on the undisputed factual findings of the courts below. (Petition, pp. 3-4, 15-17.) Such facts were recited by the Second Circuit in the light most favorable to Cioffi, for purposes of Defendants' summary judgment motion. (App. A at 6a.)

The Second Circuit found that Cioffi was responsible for the supervision of Coach Earl and the football team, and

that he was part of a team of school district administrators who responded to the hazing incident. (App. A at 3a, 17a; Petition, p. 15.) The Second Circuit concluded that ensuring the health and safety of student athletes was at the core of Cioffi's job responsibilities as Athletic Director, and that his November 7, 2001 letter was prepared in furtherance of those responsibilities, even if the letter was also submitted for a self-serving purpose. (App. A at 4a-5a, 15a-16a; Petition, pp. 15-17.) In its petition, Averill Park has not disagreed with these key factual findings.

Cioffi's effort to distance his November 7, 2001 letter from the ambit of his official duties rests solely on his false contention that his letter was addressed to the Board of Education, to whom he had no direct reporting relationship. (Brief in Opposition, p. 8.) As evident from the face of that letter, and as the Second Circuit noted, Cioffi's November 7, 2001 letter was addressed to Dr. Johnson, to whom Cioffi did report. (App. A at 4a; App. at 1a.) At Cioffi's request, Dr. Johnson also shared that letter with the Board. (App. A at 4a; App. B at 26a.) Cioffi does not dispute his deposition testimony that in addressing the hazing incident and its aftermath in his November 7, 2001 letter, he was "doing [his] job" because "health and safety, liability, professional misjudgment are all things that an Athletic Director must bring to his superiors." (R. 350; Petition, p. 15.)

As the courts below found, Cioffi's *modus operandi* as Athletic Director was to regularly complain to both the Superintendent and the Board of Education about Coach Earl and the allegedly "out-of-control" football program. (App. A at 3a; App. B at 24a-25a.) Consistent with this finding, Cioffi's complaint alleges that:

> ¶ 21 Plaintiff in his capacity as Athletic Director warned High School and School District

> officials as to the improper activities, policies and practices of the football program . . .
>
> ¶ 28 In attempting to alert District officials to these activities, policies and practices, Plaintiff was acting in his official capacity as Athletic Director with a concern for the health and safety of the students . . .

(R. 35-36.) The question presented is whether the Second Circuit should reconsider these uncontested record facts, with the benefit of this Court's instruction in *Garcetti*, to determine anew whether Cioffi's speech may be sheltered under the mantle of the First Amendment.

REASONS FOR GRANTING THE PETITION

I. REMAND WILL CONSERVE JUDICIAL RESOURCES AND PERMIT THE SECOND CIRCUIT TO DEVELOP A COMPREHENSIVE ANALYTICAL FRAMEWORK FOR APPLYING *GARCETTI*.

Both the *per curiam* and dissenting opinions in *Lawrence v. Chater*, 516 U.S. 163 (1996), upon which Cioffi relies, (Brief in Opposition, pp. 2, 6, 8) demonstrate that the Second Circuit should be directed to consider the effect of this Court's holding in *Garcetti* upon Cioffi's free speech claim. In *Lawrence*, this Court explained at length the circumstances which warrant granting certiorari for the limited purpose of vacating the judgment below, and remanding so that the Court of Appeals may reconsider a case in light of intervening developments. All of the Justices of this Court agreed that issuing such an order is most appropriate when a controlling decision of this Court is rendered after the Court of Appeals'

decision, which casts doubt on the resolution of a federal question. 516 U.S. at 167 (per curiam); *Stutson v. United States/Lawrence v. Chater*, 516 U.S. 163, 180-81 (1996) (Scalia, J., dissenting). In such circumstances, this Court instructs "the lower courts to apply the new rule retroactively to cases not yet final." *Lawrence*, 516 U.S. at 167. Doing so:

> conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Id.

Because such a limited order by this Court does not rest upon a finding of error by the lower court, and requires only further consideration, this Court applies a "more liberal" standard than is applicable for granting plenary review. A finding of "probable reversal" is not required in these circumstances. Rather, this Court need only find "a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration," and that such reconsideration "may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. This Court also considers the "equities" in a particular case, including whether the delay and cost entailed by a remand are justified by the potential benefits of further consideration by the lower court. *Id.* at 168.

These considerations demonstrate that remand is warranted to give the Second Circuit an opportunity to reconsider the threshold question of whether Cioffi's speech is protected under the First Amendment, in light of this Court's decision in *Garcetti*. When the Second Circuit issued its decision, it did not have the benefit of this Court's teaching in *Garcetti*, which adds to the protected speech analysis a new, threshold inquiry as to whether a public employee's speech was part of his or her official duties. If the answer to that separate and distinct question is "yes," then the First Amendment claim must fail, without regard to whether the speech touches on a matter of public concern.[1] The Second Circuit improperly collapsed these two inquiries, when it anticipated that Cioffi's speech could be considered that of a "citizen/employee," even though such speech was within the ambit of his job duties, simply because it touched on matters of public concern.[2] (App. A at 16a, n.3.)

Averill Park trusts that the Second Circuit would be mindful of its duty to faithfully apply this Court's holding in *Garcetti* upon remand. Notably, the Second Circuit recently issued a decision, following remand by this Court, that was

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1. There can be little doubt that Mr. Ceballos' "disposition memorandum" touched on matters of public concern, including alleged police misconduct. *Garcetti*, 126 S. Ct. at 1955-56. This Court, however, never reached that issue in *Garcetti*, based on its conclusion that the "disposition memorandum" was prepared within the scope of Mr. Ceballos' official duties, and was thus unprotected. *Id.* at 1960-61.

2. For this reason, Averill Park's petition for certiorari is not based upon a claim that the Second Circuit "misapplied a properly stated rule of law." (Brief in Opposition, p. 1.) Without waiting for this Court to enunciate the new, properly stated rule of law applicable to a public employee free speech case such as this one, the Second Circuit incorrectly assumed what the effect of this Court's then-forthcoming decision in *Garcetti* might be. (App. A at 16a, n.3.)

diametrically opposed to its earlier decision, in *Meacham v. Knolls Atomic Power Labs*, __ F.3d __, 2006 WL 2338174 (2d Cir., Aug. 14, 2006). As discussed in the petition, this Court remanded *Meacham* to the Second Circuit, to permit reconsideration of whether a jury verdict in favor of plaintiffs could stand, following an intervening decision by this Court which made it more difficult for plaintiffs to prevail on "disparate impact" claims of age discrimination. (Petition, pp. 20-21.) Following remand, the Second Circuit invalidated the jury verdict which it had previously upheld, on the grounds that its prior rejection of the employer's defense was "untenable" in light of this Court's subsequent teaching that a "business necessity" test was inapplicable to the defense of plaintiffs' claims. *Meacham*, 2006 WL 2338174 at *3.

Similarly, the Second Circuit now has the benefit of this Court's explicit instruction in *Garcetti*, which requires the court to make a threshold determination that the plaintiff-employee was not speaking within the scope of his or her official duties, before passing on the next and entirely separate line of inquiry as to whether the employee's speech touched upon a matter of public concern. On the undisputed record evidence in this case, there is at least a "reasonable probability" that the Second Circuit would reverse its holding that Cioffi's speech is protected under the First Amendment. The equities also favor remand in this case, because a threshold determination that Cioffi's speech is not protected, following *Garcetti*, would obviate the need for a time-consuming and expensive jury trial, and possible post-trial appeals. Remand will also afford the Second Circuit an opportunity to develop a comprehensive analytical framework for the proper application of this Court's decision in *Garcetti*.

II. RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION ARE MERITLESS.

In opposition to the petition, Cioffi contends that the "posture of this case" does not favor remand. Specifically, Cioffi argues that: 1) *Garcetti* is inapplicable to his First Amendment claim because a "*Pickering* balancing test" is inapplicable to this case; 2) a jury trial should *precede* reconsideration of whether Cioffi has a triable First Amendment claim; and 3) Averill Park has waived its right to benefit from the retroactive application of *Garcetti* to the facts of this case. None of these arguments support denial of the petition.

With respect to the causation element of Cioffi's retaliation claim, Averill Park is defending on the grounds that it abolished the Athletic Director position for legitimate economic reasons, and that it would have done so even in the absence of any anger over Cioffi's speech. (App. A at 20a.) Averill Park's defense comports with this Court's seminal "dual motives" analysis in *Mount Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 283-87 (1977). Because Cioffi was not terminated for cause, at the summary judgment stage, a "*Pickering* balancing test" was not required to determine whether any disruption occasioned by Cioffi's speech justified his termination. *Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563, 570-71 (1968). On this basis, Cioffi incorrectly leaps to an assertion that Averill Park has "admitted" that it had no legitimate interest in controlling his employment-related speech, and that *Garcetti* is thus inapplicable. (Brief in Opposition, pp. 2, 5, 11.)

This Court's decision in *Garcetti* is not dependent upon a *Pickering* balancing test. Both the *Pickering* balancing test and the *Mount Healthy* "dual motives" analysis require a

predicate finding that plaintiff's speech is protected under the First Amendment before the causation element is addressed. *Pickering*, 391 U.S. at 572-73; *Mount Healthy*, 429 U.S. at 284. If the answer to that threshold question is "no," the case is at an end. *Garcetti*, 126 S. Ct. at 1951.

Indeed, a *Pickering* balancing test would not necessarily have been required in *Garcetti*, even if plaintiff's speech had been deemed protected. Like Averill Park, the defendant-employer in *Garcetti* did not contend that plaintiff's speech was unduly disruptive, and thus justified the adverse employment actions against him. Like Averill Park, the defendant-employer in *Garcetti* instead contended that the adverse employment actions against plaintiff were justified by legitimate, non-retaliatory reasons, notwithstanding their "heated" reaction to plaintiff's "disposition memo." 126 S. Ct. at 1956.

As this Court concluded in *Garcetti*, a public employer's interest in controlling the content of an employee's work product, which it pays for, extends well beyond preventing "disruptive" speech. When an employee speaks or writes in his or her professional capacity, the employer may act to ensure that the communications "are accurate, demonstrate sound judgment, and promote the employer's mission." 126 S. Ct. at 1960. "Inflammatory or misguided" official communications may subject a public employee to adverse action, with no constitutional consequences. *Id.* at 1960-61. The application of *Garcetti* is thus not limited to cases involving "disruptive" work-related speech.

In sum, if Cioffi's speech is not protected following *Garcetti*, there is no need to reach the causation element of Cioffi's claim, under either *Pickering* or *Mount Healthy*. This threshold question thus should be reconsidered by the Second Circuit, on the record evidence adduced at the summary judgment stage, in light of *Garcetti*.

Cioffi asserts that remand is unnecessary because if a jury agrees with Averill Park's defense on the causation element of his retaliation claim, the question of whether his speech is protected may become moot. (Brief in Opposition, pp. 3, 13.) Cioffi's argument attempts to put the proverbial cart before the horse, by requiring Averill Park to defend a jury trial on causation, before any threshold determination is made as to whether his speech is protected following *Garcetti.* Such a procedural course would unnecessarily deplete judicial resources, and would likely result in further post-trial appeals.

Finally, Cioffi contends that remand is unwarranted because Averill Park did not specifically argue the *Garcetti* analysis in the courts below, before this Court rendered its decision. (Brief in Opposition, pp. 11-13.) Cioffi's argument is unavailing, because Averill Park has at all times throughout this litigation argued that Cioffi's speech is not protected. (App. A at 5a-6a; App. B at 28a-29a.) Nothing more is required to permit the retroactive application of this Court's decision in *Garcetti* to Cioffi's pending case.

This Court has ruled that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The federal question in *Lebron* was whether Amtrak was subject to the First Amendment as a government actor. In the courts below, plaintiff argued that Amtrak was a private entity, but was so closely connected to federal entities as to be subject to the First Amendment. After this Court granted certiorari, plaintiff presented for the first time an alternative argument that Amtrak was itself a federal entity. *Id.* This Court concluded that plaintiff's new argument was cognizable, because it was not a new claim,

but rather an alternative theory to support plaintiff's consistent position that Amtrak was subject to the First Amendment. *Id.*

Similarly, in this case, Averill Park is not raising a new claim or defense. Averill Park has instead presented, in its petition for certiorari, an alternative argument to support its steadfast position that Cioffi's speech is not protected under the First Amendment. Averill Park has never waived or abandoned this defense. Accordingly, the Second Circuit should be directed to retroactively apply *Garcetti,* at the summary judgment stage.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari shold be granted, at least to the limited extent of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for further consideration in light of *Garcetti.*

Respectfully submitted,

BETH A. BOURASSA*
JOHN P. CALARESO, JR.
WHITEMAN OSTERMAN & HANNA LLP
One Commerce Plaza
Albany, NY 12260
(518) 487-7600

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX — LETTER DATED NOVEMBER 7, 2001

November 7, 2001

Dr. Michael Johnson, Superintendent of Schools
Averill Park Central School District Office
8439 Miller Hill Road
Station 1
Averill Park, NY 12018

Dear Dr. Johnson:

After the administrators' meeting on October 29, 2001, Nancy & I were requested to remain after everyone had left in order to speak with Jo Moccia and you concerning the hazing issue. In the course of the discussion, Jo made an innocent comment about 'the leadership' perhaps somehow sharing responsibility for the incident, and how this incident could possibly be allowed to have happened. She was, appropriate to her role, asking an obvious and important question. The immediate response by Nancy was to denounce the suggested 'lack of leadership' as an excuse for the misconduct. She went on to explain that, indeed, Kevin has not experienced having administrative oversight by either her or me, since we were both directed to limit our dealings with him. Further, we were directed to inform you about any/all incidents that we found to be troubling, and that you would deal with Kevin directly, or, give us directives as to what to do. It bothers me that Jo was, seemingly, unaware that we were given this directive, and that Kevin was 'allowed' to run by a different set of rules from other faculty members and coaches. Whenever we were faced with a question about what to do about 'misconduct' on Kevin's part, we only acted after consulting with and being directed by you. I followed your directives to the letter.

In that same meeting with Jo, you did affirm that this was the case. You stated that Jo was not 'up to speed' on all of the facets of the 'Kevin issue'.

Appendix

My concern is that some board of education members may not be 'up to speed' on all of the facets of the 'Kevin issue' as they relate to the leadership question. I believe I have been nothing but conscientious about alerting you when I had concerns. Should you review your files, you will find numerous memos concerning Kevin. I have been diligent in following your directives in dealing with Kevin, even if we disagreed with the direction being taken.

Attached, for example, is the letter sent by me outlining several instances of Kevin's not following procedure, or of his failure to recognize boundaries. Since that time, as you know, Michael, I received a copy of a handout that was given to all football players by Kevin, in which he demands silence from all team members, as well as outlining procedures that are in opposition to the blue card (a copy is also attached). This collection of troubling instances worries me, since board members may be aware of some or all of them, and believe (wrongly) that Nancy and I knew of them, and did nothing about them, when, indeed, they were duly reported each and every time. This, unfortunately, is but a small fraction of instances that I have documented and discussed over the past five plus years, relating to Kevin Earl.

I realize that the board of education membership has changed over the past several years. It would probably be impossible for new board members to be 'up to speed' on each and every issue. However, in light of the very serious nature of recent events involving the hazing issue, I feel compelled to set the record straight about the 'leadership' question.

My overriding concern has been for the health and safety of our students, as well as for the school district potentially being held liable for professional misjudgment. It is for these reasons that I continue to report instances of concern regarding Kevin's

behavior, or that of any coach or teacher, for that matter. I wish to assure you that I have taken my duty to do so quite seriously.

In our discussion on November 6 between Nancy, me, Jo and you, we were informed that the definition you were provided by outside sources of the word 'victim' leads you to conclude that we do not have a victim in the hazing situation. While I have a problem accepting that explanation about why perpetrators have not actively been sought out, I have and continue to support the direction you and the board have decided to take. My concern is that others may have been victimized as well (for example: some of the boys who watched the hazing take place and felt powerless to stop it; others who have been too scared to come forward; others who are presently in seventh or eighth grades and have heard about it happening to ninth graders and who fear it). The needs of these individuals may not have been served by the investigation that took place. Again, that said, I continue to wholly support the direction decided upon by you and the board of education in this matter. I have assisted in facilitating the training session to be presented to all of our students on December 11 and 12. Also, a very positive meeting was conducted on November 6, at which I invited Mr. Ernest Steck to speak with coaches on the topic of professional responsibility.

As always, I thank you for your continued willingness to listen to concerns, and for your attention to these serious issues.

Sincerely,

s/ Lou Cioffi
Lou Cioffi